

MANUFACTURERS PROGRAMS BRANCH
INTERIM PENALTY POLICY
MARCH 31, 1993 ¹

I. INTRODUCTION

This document establishes the Manufacturers Programs Branch (MPB) interim policy for assessing civil penalties for violations of certain Clean Air Act provisions. The policy adheres to the Environmental Protection Agency's (EPA) Policy on Civil Penalties, dated February 16, 1984. Accordingly, the purposes of this policy are to deter potential violators, to ensure that MPB assesses fair and equitable civil penalties, and to resolve environmental problems swiftly. Because this policy may be too general for violations of the MPB Imports Program, separate guidance for Imports Program Penalty assessments is included in Appendix I.

MPB enforces several provisions under Title II of the Clean Air Act (Act) and associated regulations to assure that motor vehicles and motor vehicle engines conform with Federal emission requirements. Section 203(a)(1) of the Act prohibits manufacturers of new motor vehicles or new motor vehicle engines from selling, offering for sale, introducing or delivering into commerce, or (in the case of any person, except as provided by regulation of the Administrator) importing into the United States such vehicles or engines, unless such vehicles or engines are covered by a certificate of conformity. Section 203(a)(2) of the Act prohibits, among other things, any person from failing or refusing to permit access to or copying of records or failing to make reports or provide information required under section 208 of the Act. Finally, MPB enforces section 203(a)(4) of the Act which in certain circumstances prohibits manufacturers from selling or leasing any motor vehicle or motor vehicle engine unless a label or tag is affixed to such motor vehicle or motor vehicle engine in accordance with section 207(c) of the Act.

The Act was amended on November 15, 1990. Under section 205(a) of the Act, a violator of section 203(a)(1) or (4) is now liable for a civil penalty of not more than \$25,000, with each motor vehicle or motor vehicle engine constituting a separate offense. A violator of section 203(a)(2) is now liable for a civil penalty of not more than \$25,000 per day of violation. Section 205(b) of the Act provides the Administrator authority to commence a civil action in district court to assess and recover any civil penalty under section 215(a).

The amended Act also provides the Administrator with the authority to issue administrative penalty orders under section 205(c) of the Act except that the maximum penalty amount sought against a violator in an administrative penalty assessment proceeding shall not exceed \$200,000.

1. This policy will not apply to penalty assessments for violations that occurred prior to November 15, 1990.

MPB will use this policy to calculate settlement amounts during the course of an investigation. This policy will also serve as guidance in calculating administrative penalties under section 205(c) of the Act .

This document is not meant to control the penalty amount requested in judicial actions. It is EPA's policy to ask the court for the maximum penalty allowable under the Act in a complaint filed in U.S. District Court. After a case has been referred to the Department of Justice, use of this policy is limited to pre-trial settlement.

The procedures set out in this document are intended solely for the guidance of government personnel. They are not intended and cannot be relied upon to create rights, substantive or procedural, enforceable by any party in litigation with the United States. The Agency reserves the right to act at variance with this policy and to change it at any time without public notice.

II. PRELIMINARY DETERRENCE AMOUNT

The Policy on Civil Penalties states that deterrence is an important goal of penalty assessment. It states that at a minimum, a penalty should remove any significant benefits resulting from noncompliance. In addition, it should include an amount beyond removal of the economic benefit to reflect the seriousness of the violation. The portion of the penalty which removes the economic benefit of noncompliance is the "economic benefit component"; the part of the penalty which reflects the seriousness of the violation is the "gravity component". Combined, these components make up the "preliminary deterrence amount". This section provides guidelines for calculating the benefit component and the gravity component.

A. THE BENEFIT COMPONENT

The "economic benefit component" should be calculated and added to the gravity-based penalty component when a violation results in "significant" economic benefit to the violator. The economic benefit will include the benefit of delayed costs, avoided costs, and competitive advantage.

1. Delayed Cost

Delayed costs are expenditures which have been deferred by the violator's failure to comply with the requirements. By deferring these one-time nonrecurring costs until EPA takes enforcement action, the violator has achieved an economic benefit.

For example, a manufacturer makes a motor vehicle configuration change during production that may affect emissions, but fails to notify EPA as required. Several months later, the production change

is discovered during an EPA audit and the manufacturer subsequently submits the required notification to EPA. In this situation, the affected motor vehicles introduced into commerce after the production change, but prior to the manufacturer's notification were not covered by a certificate of conformity in violation of section 203(a)(1) of the Act. Moreover, the manufacturer may have experienced an economic benefit by delaying EPA notification. Generally, the manufacturer delayed the expenditure of resources necessary to compile the requested information. In addition, the manufacturer may have delayed the expenditure of resources necessary to perform the required engineering evaluation or motor vehicle testing to determine that the production change did not affect the motor vehicle's ability to meet the applicable emission standards.

A detailed economic analysis may be computed using the Guidance for Calculating the Economic Benefit of Noncompliance for a Civil Penalty Assessment, November 5, 1984.

2. Avoided costs

Avoided costs are expenditures completely averted by the violators' failure to comply. Several examples of avoided costs are discussed below.

A misbuild violation may reflect significant costs avoided by the manufacturer. Specifically, a misbuild occurs when the manufacturer produces vehicles which do not conform in all material respects to the prototype vehicle described in the manufacturer's application for a certificate of conformity. Misbuild violation savings may be estimated by assessing the cost savings the manufacturer realizes from not having quality control procedures or from having deficient quality control procedures, if, in fact, the misbuild occurred because of quality control problems. The assessment may also include any net profits, benefits, or the difference in cost of producing a vehicle in a certified configuration versus a misbuilt configuration. The net profit figure should be adjusted to reflect the present value of net profits derived in the past.

A violation of section 208 of the Act may also result in costs savings to the manufacturer. Section 208 of the Act requires every manufacturer and other regulated persons to establish and maintain records, perform tests, make reports, and provide information to the EPA to determine compliance with Title II of the Act. Specifically, a violator of this section realizes costs savings from avoiding the expenditure of resources necessary to compile the information requested or to maintain the required records. The costs include the labor necessary to retrieve and compile the information.

Any indirect benefits from a section 208 reporting violation should also be recovered. For example, a violator submits an application for a certificate of conformity which includes false or misleading information. Subsequently, the Administrator issues a certificate of conformity for a nonconforming engine family based on

that false or misleading information. Although the manufacturer may not realize any significant savings in clerical costs from false reporting, the manufacturer may realize a substantial benefit from avoiding compliance with the emissions requirements. The cost of avoiding compliance should therefore be recovered.

A detailed economic analysis may be computed using the Guidance for Calculating the Economic Benefit of Noncompliance for a Civil Penalty Assessment, November 5, 1984. The EPA BEN computer model may be used to calculate the economic benefit of noncompliance.

3. Competitive Advantage

Removing the savings which accrue from noncompliance will usually be sufficient to remove the competitive advantage the violator has gained. However, in some cases, the noncompliance allows the violator to provide goods or services which are not available elsewhere or are more attractive to the consumer.

For example, a manufacturer may experience a competitive advantage by incorrectly reporting its actual production volume in its end-of-year report for the purpose of obtaining credits in EPA's averaging, trading, and banking program. The competitive advantage may include any profit the manufacturer received for credits it traded to other manufacturers before the violation was discovered. The value of any competitive advantage the violator gained from noncompliance should be recouped in the economic benefit component.

4. Settling For Less Than The Economic Benefit .

To avoid encouraging industry to avoid or delay compliance, the Agency will almost always seek to recover an amount equal to or more than the economic benefit component. Accordingly, any action to settle a case for less than the economic benefit should be infrequent. Further, such settlements should include a detailed justification in the case file. Three instances that may warrant settling a case for less than the economic benefit are discussed below.

It is clear that assessing the benefit component and negotiating over it will often represent a substantial commitment of resources. Such a commitment of resources may not be warranted in cases where the magnitude of the benefit component is likely to be insignificant or de minimus, (e.g. not likely to have a substantial impact on the violator's competitive positions). For this reason, MPB will use its discretion not to seek the benefit component where it appears that the amount of the component is less than \$10,000. When making the determination, MPB should consider the impact on the violator, the size of the gravity component, and the certainty of the magnitude of the benefit component.

In other instances there may be compelling public concerns that would be penalized if a defendant has this penalty component assessed against it. Relevant public concerns may include adverse precedent or

extreme financial burden to the defendant resulting in bankruptcy or plant closings. As such it may become necessary to consider settling a case for less than the economic benefit component.

Finally, there may be certain cases in which it is highly unlikely that MPB will be able to recover the economic benefit in litigation. This may be due to applicable precedent, competing public interest considerations, or the specific facts, equities, or evidentiary issues pertaining to a particular case. In such a situation it is unrealistic to expect MPB to obtain a penalty in litigation which would remove the economic benefit. Accordingly, MPB should pursue a lower penalty amount.

B. THE GRAVITY COMPONENT

EPA must consider the gravity of a violation in assessing civil penalties. The gravity of a violation may be determined by assessing: 1) the potential for harm; and 2) the extent of deviation from the statutory or regulatory requirement.

1. Identifying the Potential for Harm

The Federal emission standards and regulatory requirements were promulgated to prevent harm to human health and the environment. Certain regulatory requirement violations may create a risk of such harm by jeopardizing the integrity of the Federal emission program. Thus, noncompliance with any Clean Air Act emission standard or regulatory requirement may result in a situation where there is potential for harm to human health or the environment.

Accordingly, the assessment of the potential for harm resulting from a violation should be based on: 1) the risk of human or environmental exposure to emissions and/or constituents posed by noncompliance; and 2) the risk of adverse effect on statutory or regulatory purposes or procedures implementing the emissions program posed by noncompliance.

2. Ranking the Potential Harm

Enforcement personnel should evaluate whether the potential harm is major, moderate, or minor for each violation. Each category is defined below.

Major - The violations pose or may pose a substantial risk of exposure of humans or the environment to harmful exhaust emissions or constituents; and/or the violations have or may have a substantial adverse effect on the statutory or regulatory purposes or procedures implementing the emissions program.

An example of a violation in this category is an instance where a manufacturer introduces into commerce a motor vehicle or engine that does not comply with Federal certification requirements, and as a result the motor vehicle or engine exceeds emission standards. Another example of a violation in this category is an instance where

a manufacturer introduces vehicles or engines into commerce without a certificate of conformity (including instances where a manufacturer fails to submit or submits an inaccurate certificate of conformity application).

Moderate - The violations pose or may pose a significant risk of exposure of humans or the environment to harmful exhaust emissions or constituents; and/or the violations have or may have a significant adverse effect on statutory or regulatory purposes or procedures implementing the emissions program.

An example of a violation in this category is an instance where a manufacturer introduces a motor vehicle or engine into commerce that meets Federal emission standards, but fails to conform to the specifications as listed in the certificate of conformity application. Another example of a violation in this category is an instance where a manufacturer fails to comply with reporting requirements.

Minor - The violations pose or may pose a relatively low risk of exposure of humans or the environment to harmful exhaust emissions or constituents; and/or the violations have or may have an adverse effect on the statutory or regulatory purposes or procedures implementing the emissions program.

An example of a violation in this category is an instance where a manufacturer introduces into commerce a motor vehicle or a motor vehicle engine that fails to comply with labeling requirements.

3. Ranking the Extent of Deviation

The extent of deviation from a statutory or regulatory requirement relates to the degree of noncompliance with that requirement. Enforcement personnel should evaluate whether the extent of deviation is major, moderate, or minor for each violation. Each category is defined below.

Major - The violator deviates from requirements of the regulation or statute to such an extent that many (or important aspects) of the requirements are not met resulting in substantial noncompliance.

An example of a violation in this category is an instance where a manufacturer introduces into commerce a motor vehicle or engine that fails to comply with many Federal certification requirements. Another example of a violation in this category is an instance where a manufacturer submits a certificate of conformity application that is substantially inaccurate. Another example is an instance when a manufacturer introduces into commerce motor vehicles/engines, but does not affix Federal emission labels to such motor vehicles/engines.

Moderate - The violator significantly deviates from the requirements or statute.

An example of a violation in this category is an instance where a manufacturer introduces into commerce a motor vehicle or engine that fails to comply with several Federal certification requirements. A similar example of a violation in this category is an instance where a manufacturer submits a significantly inaccurate certificate of conformity application or a significantly late or incorrect running change report or defect report. Another example is when a manufacturer introduces into commerce motor vehicles/engines but affixes incorrect Federal emission labels to such motor vehicles/engines.

Minor - The violator deviates from the regulatory or statutory requirements but most (or all important aspects) of the requirements are met.

An example of a violation in this category is an instance where a manufacturer introduces into commerce a motor vehicle or engine that fails to comply with one Federal certification requirement. Another example of a violation in this category is an instance where a manufacturer submits a slightly inaccurate certificate of conformity application or slightly late or incorrect running change report or defect report. Another example is when a manufacturer introduces into commerce motor vehicles/engines but fails to affix or affixes an incorrect Federal emission labels to such motor vehicles/engines, but the violation is remedied prior to sale to the final purchaser.

4. Dollar amount Matrix Assessment

The potential for harm and extent of deviation form the axes of the penalty assessment matrix. The matrix has nine cells, each containing a penalty range. The specific cell is chosen after determining which category is appropriate for the potential for harm factor, and which category is appropriate for the extent of deviation factor. The lowest cell contains a penalty range from \$100 to \$499. The highest cell is limited by the maximum statutory penalty allowance of \$25,000 per day of violation.

Enforcement personnel must select the penalty amount within each cell in each case. The dollar amount range within each cell allows enforcement personnel to assess an initial gravity component figure that adapts the general gravity of the violation to case specific facts. The matrix is illustrated below in Table 1. (See original for this table)

A matrix containing case specific examples is attached (Attachment 1).

5. MULTIPLE VIOLATION PENALTIES

a. Multiple Violations

A separate penalty should be sought in a complaint and obtained in a settlement for each separate violation that results from a

violator's independent act (or failure to act) that is substantially distinguishable from any other charge in the complaint. A charge is independent of, and substantially distinguishable from, any other charge when it requires a distinct element of proof. Generally, violations of different sections of the regulations constitute independent and distinguishable transgressions. For example, introducing a motor vehicle into commerce not covered by a certificate of conformity and failing to submit a defect report are violations which can be proven only if the Agency substantiates different sets of factual allegations.

Sections 205(a) of the Act states that violations of section 203(a)(1) shall constitute a separate offense for each motor vehicle or motor vehicle engine. Consequently, there are instances where a manufacturer's failure to satisfy one statutory or regulatory requirement either necessarily or generally leads to numerous separate motor vehicle or motor vehicle engine violations. For example, a manufacturer installs a catalyst for an entire engine family that does not conform to the applicable certificate application and as a result, introduces numerous motor vehicles into commerce not covered by a certificate of conformity. In cases like this where multiple vehicle violations result from a single initial transgression, the calculation in Table 2 below should be added to the appropriate matrix dollar amount from Table 1:

Table 2: MULTIPLE VEHICLE VIOLATION VALUE (MVVV)
(See original for this table)

To ensure that a violator committing only a minor infraction for numerous vehicles and a violator committing an especially egregious violation for only a few vehicles are penalized in proportion to the violation's relative harm, the sum of the appropriate matrix dollar amount from Table 1 and the multiple vehicle violation dollar amount from Table 2 should be multiplied by the appropriate factor listed in Table 3 below, for the total gravity component amount:

TABLE 3: MULTIPLE VEHICLE VIOLATION FACTOR
(See original for this table)

Please note that, in rare instances, a violation may involve unusually large numbers of motor vehicles. In these cases, the multiple vehicle value/violation calculation in Table 3 may produce a disproportionately high penalty. Accordingly, in very limited situations, MPB may use discretion to forego assessing a per vehicle dollar amount based on Tables 1 through 3 for the violation provided the total penalty for the violation is appropriate given the gravity of the offense and sufficient to deter similar future behavior.

b. Penalties for Multi-Day Violations

The Act provides EPA authority to seek civil penalties of not

more than \$25,000 per day of non-compliance for each violation of section 203(a)(2) of the Act. This language explicitly authorizes the Agency to consider the duration of each violation as a factor in determining an appropriate total penalty amount.

However, under a straight \$25,000 per day assessment, a manufacturer that fails to submit a running change report to EPA until 30 days after the change was implemented, could be liable for a disproportionately high penalty. Therefore, the assessment of \$25,000 per-day penalties should be reserved for repeated or considerably harmful acts.

Generally, reasonable recordkeeping oversights resulting in violations of section 203(a)(2) of the Act will be assessed on a one-day basis according to the appropriate penalty matrix dollar amount in Table 1. For violations continuing for one month or more, however, the appropriate dollar amount listed in Table 4 below should be added to the dollar amount in Table 1. To estimate the length of time of the violation, violations should be assumed to be continuous from the first provable date of violation until the date of the compliance.

Table 4: MULTI-DAY VIOLATION VALUE
(See original for this table)

However, when a violation of section 203(a)(2) poses a risk of significant harm to the environment or the integrity of the Federal emission program, MPB may consider assessing per-day penalties. An example of such a violation is a defendant's refusal to answer a request for information made pursuant to section 208 of the Act. Per-day penalties are calculated by multiplying the one-day matrix dollar amount in Table 1 by the number of days the violator is in noncompliance.

IV. ADJUSTING THE GRAVITY COMPONENT

To promote equitable penalties among violators, penalty assessments must have enough flexibility to consider unique facts in specific cases. Accordingly, EPA's Policy on Civil Penalties allows adjustments to the initial gravity penalty amount for legitimate differences between cases. Upward or downward adjustments apply only to the gravity component not the economic benefit. In addition, such adjustments should be made prior to the commencement of negotiations thereby establishing the initial settlement amount. However, if during the course of negotiations, the litigation team receives new information impacting the assessment, the gravity component may be adjusted upward or downward as applicable to yield an adjusted minimum settlement amount.

MPB should base any adjustment to the gravity component on the factors listed below and to carefully document justification. Generally, adjustments shall be 0-20 percent and within the absolute discretion of MPB. A 21-30 percent adjustment is only appropriate in unusual circumstances. Finally an adjustment over 30 percent is only appropriate in extraordinary circumstances. Relevant adjustment

factors are discussed below.

A. Degree of Willfulness or Negligence

Knowing or willful violations can give rise to criminal liability while a force majeure or accident may indicate no penalty is appropriate. Between these two extremes, the violator's willfulness and/or negligence should be reflected in the penalty amount. The following points should be considered in assessing the degree of willfulness or negligence adjustment: (1) the degree of control the violator had over the events constituting the violation; (2) the foreseeability of the events constituting the violation; (3) the level of sophistication within the industry in dealing with compliance issues or the accessibility of appropriate control technology (if this information is readily available); and (4) the extent to which the violator in fact knew of the legal requirement which was violated. Finally, lack of knowledge is not a basis to reduce the penalty; rather, knowledge should only enhance the penalty.

B. Degree of Cooperation

The degree of cooperation of the violator in remedying the violation is an appropriate factor to consider in adjusting the penalty. Mitigation based on this factor is appropriate in the situations discussed below.

1. Prompt reporting of noncompliance

The gravity component may be mitigated when a violator promptly reports its noncompliance to EPA if there is no legal requirement to do so. The fact that EPA may have discovered the violation later requires less mitigation. Conversely, if the violator avoids revealing violations to EPA, an aggravated adjustment may be appropriate.

2. Prompt correction of environmental problems

The gravity component may also be mitigated if the violator makes extraordinary efforts to avoid violating an imminent requirement or to come into compliance after learning of the violation. Such efforts may include implementing additional administrative procedures to avoid future violations or recalling motor vehicles or motor vehicle engines that were introduced into commerce not covered by a certificate of conformity to correct the excess emissions. In general, the earlier the violator instituted corrective action after discovery of the violation and the more complete the corrective action instituted, the larger the penalty reduction EPA will consider.

C. History of Noncompliance

The gravity component may also be adjusted if a violator has violated an environmental requirement previously that resulted in a

formal enforcement action. For purposes of this adjustment, a previous formal enforcement action may include a delivered penalty letter, a delivered letter informing defendant of noncompliance, a judicial complaint filed in Federal district court or an administrative complaint filed with the hearing clerk, a consent decree signed by EPA and the defendant, a consent agreement signed by EPA and the defendant, or a final order by the district court judge or magistrate or administrative law judge. In determining the exact adjustment percentage, the following points should be considered: (1) the similarity of the violation in question to prior violations; (2) the time elapsed since the prior violation; (3) the number of previous violations; and (4) the violator's response to prior violation(s) with regard to correcting the previous infractions and efforts to avoid future violations.

The following guidelines for gravity component adjustments based on a violator's history of noncompliance should be applied. For relatively few dissimilar violations, MPB has discretion to raise the penalty amount 20 percent. For relatively large numbers of dissimilar violations, the gravity component can be increased up to 30 percent. If the violation pattern is one of similar violations, MPB has discretion to raise the penalty amount up to 30 percent for the first repeat violation and higher for further repeated similar violations.

For the purposes of this section, a violation should generally be considered "similar" if a previous enforcement response should have alerted the party to a particular type of compliance problem. Some facts that indicate a "similar violation" was committed may include: 1) the same statutory or regulatory provision was violated; or 2) a similar act or omission.

V. SIZE OF THE VIOLATOR

The size of the violator should be considered in assessing a total penalty amount. The appropriate figure from each assigned violator value should be added to the proposed penalty only once for all violations.

In rare instances, an investigation may involve so few violations that the size of violator factor may result in a dollar amount higher than the maximum allowable penalty under the Act. Accordingly, in these very limited situations, MPB may use discretion to forego assessing a size of violator value based on Table 5 provided the total penalty for the violation is appropriate given the gravity of the offense and is sufficient to deter similar future behavior.

TABLE 5: SIZE OF THE VIOLATOR VALUE
(See original for this table)

VI. LITIGATION RISKS

The preliminary deterrence amount, both economic benefit and gravity components, may be mitigated in appropriate circumstances based on litigation risk. Evidentiary problems, or an indication from the court, or Administrative Law Judge during settlement negotiations that he or she is prepared to recommend a penalty below the minimum settlement amount presents a litigation risk. In determining whether mitigation is appropriate in this instance, specific facts, equities, evidence or legal issues should be considered.

When the basis for mitigation is litigation risk, the case attorney should document the probable outcome of litigation along with the legal and factual analysis which supports such a conclusion. Specific documentation of the evidentiary problems, adverse legal precedent, or other relevant legal issues should be addressed in the file documentation. For cases filed in district court, any adjustments to the penalty on this basis should be made in consultation with the Department of Justice.

VII. ABILITY TO PAY

MPB will generally not request penalties that are clearly beyond the means of the violator. Accordingly, MPB should consider the ability to pay a penalty in arriving at a specific final penalty assessment. At the same time, it is important that the regulated community not see the violation of environmental requirements as a way of aiding a financially troubled business. Therefore, EPA reserves the option, in appropriate circumstances, of seeking a penalty that might put a company out of business.

The ability to pay adjustment will normally require a significant amount of financial information specific to the violator. If this information is available prior to commencement of negotiations, it should be assessed as part of the initial penalty target figure. If it is not available, MPB should assess this factor after commencement of negotiation with the defendant.

The burden to demonstrate an inability to pay, as with the burden of demonstrating the presence of any mitigating circumstances, rests on the defendant. If the violator fails to provide sufficient information, then MPB should disregard this factor in adjusting the penalty.

A defendant's ability to pay should be determined according to the December 16, 1986 Guidance on Determining a Violator's Ability to Pay a Civil Penalty (GM-56) along with any other appropriate means. In addition, the National Enforcement Investigative Center (NEIC) has developed the capability to assist in determining a defendant's ability to pay. The EPA ABEL computer program may provide assistance in determining a defendant's ability to pay. If ABEL indicates that the defendant may have an inability to pay, a more detailed financial analysis verifying the ABEL results may be done prior to mitigating the penalty.

When it is determined that a violator cannot afford the penalty prescribed by this policy, the following options should be considered:

1. Consider a delayed payment schedule: Such a schedule may be contingent upon an increase in sales or some other indicator of improved business. This approach is administratively burdensome for MPB and should only be considered in unusual cases; or
2. Consider joinder of the violator's individual owners: This is appropriate if joinder is legally possible and justified under the circumstances; or
3. Consider straight penalty reductions as a last recourse: If this approach is necessary, the reasons for reduction should be made a part of the formal enforcement file and the memorandum accompanying settlement.

VIII. SUPPLEMENTAL ENVIRONMENTAL PROJECTS

EPA's Office of Enforcement (OE) has issued guidance addressing the use of supplemental enforcement projects (SEP) in EPA settlements entitled, Policy on the Use of Supplemental Enforcement Projects in EPA Settlements, dated February 12, 1991. MPB should follow the OE policy in determining appropriate environmental projects to mitigate settlement amounts.

IX. DOCUMENTATION

To insure that MPB imposes fair and equitable penalties, it is intended that a proposed penalty be consistent with previous MPB penalty assessments. While this policy establishes systematic methods of calculating penalties, it also allows considerable flexibility. Accordingly, to facilitate consistent enforcement results, all penalty calculations should be documented in the case file.

Case file documentation should include how the economic benefit and the gravity component amounts were calculated with any adjustments made to that amount. This penalty policy and all relevant case specific facts should be cited to justify any penalty mitigation. A penalty worksheet is attached (Attachment 2).

During the course of an enforcement action or during pre-filing negotiations, MPB should document any agreed upon changes to the bottom line penalty based upon new information or circumstances which arise during the course of the enforcement action. This documentation should include the factual basis for any mitigation, the recalculated gravity and economic benefit components, and the penalty policy justification.

To assist MPB enforcement attorneys, program staff, and management further in making consistent penalty assessments, MPB has established a case tracking computer program and a central

enforcement case file. Upon determining that an investigation is appropriate, MPB should open a file in the case tracking system. The file will be assigned a case number and computer tracked for the duration of the investigation. Upon completion, the file should include all relevant documentation and be formally closed and logged out of the computer tracking system. MPB's central file and tracking systems will provide resources to MPB staff to assess consistent penalties and ensure that all investigation files contain written penalty calculation and mitigation justifications in the event of internal or external audits.

Attachments

APPENDIX I

MANUFACTURERS PROGRAMS BRANCH MPB IMPORTS PROGRAM PENALTY POLICY MARCH 31, 1993¹

I. INTRODUCTION

EPA's Manufacturers Programs Branch Interim Penalty Policy ("MPB's General Policy") applies generally to manufacturers of new motor vehicles or new motor vehicle engines that violate requirements under sections 203(a)(1) and 203(a)(2) of the Act. That general policy does not, however, specifically address violations of the Manufacturers Programs Branch Imports Program Regulations.

This document outlines a penalty policy which applies to violations of the Imports Program Regulations. The "Imports Penalty Policy" was originally issued in January, 1990. This revised policy reflects the new Clean Air Act Amendments of 1990.

MPB enforces several provisions under Title II of the Clean Air Act (Act) and associated regulations to assure that motor vehicles and motor vehicle engines conform with Federal emission requirements. Section 203(a)(1) of the Act prohibits manufacturers of new motor vehicles or new motor vehicle engines from selling, offering for sale, introducing or delivering into commerce, or (in the case of any person, except as provided by regulation of the Administrator) importing into the United States such vehicles or engines, unless such vehicles or engines are covered by a certificate of conformity. Section 203(a)(2) of the Act prohibits, among other things, any person from failing or refusing to permit access to or

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copying of records or failing to make reports or provide information required under section 208 of the Act. Finally, MPB enforces section 203(a)(4) of the Act which in certain circumstances prohibits manufacturers from selling or leasing any motor vehicle or motor vehicle engine unless a label or tag is affixed to such motor vehicle or motor vehicle engine in accordance with section 207(c) of the Act.

Pursuant to section 203(b)(2) of the Act, EPA promulgated regulations governing the importation of new motor vehicle which do not meet the applicable Federal emission standards and requirements (nonconforming motor vehicles). The regulations are entitled, "Air Pollution Control: Importation of Nonconforming Motor Vehicles and Motor Vehicle Engines", and are located at 40 CFR Part 85, Subpart P. The regulations first became effective on November 15, 1972, 37 Fed. Reg. 24314, and were revised on September 25, 1987 52 Fed. Reg. 36136, ("Imports Regulations").

The Act was amended on November 15, 1990. Under section 205(a) of the Act, a violator of section 203 (a)(1) or (4) is now liable for a civil penalty of not more than \$25,000, with each motor vehicle or motor vehicle engine constituting a separate offense. A violator of section 203 (a)(2) is now liable for a civil penalty of not more than \$25,000 per day of violation. Section 205(b) of the Act provides the Administrator authority to commence a civil action in district court to assess and recover any civil penalty under section 205(a).

The amended Act also provides the Administrator with the authority to issue administrative penalty orders under section 205(c) of the Act except that the maximum penalty amount sought against a violator in an administrative penalty assessment proceeding shall not exceed \$200,000.

MPB will use this policy to calculate settlement amounts during the course of an investigation. This policy will also serve as guidance in calculating administrative penalties under Section 205(c) of the Act. MPB will also use this policy as guidance in imposing sanctions provided for in the Imports regulations.

This document is not meant to control the penalty amount requested in judicial actions. It is EPA's policy to ask the court for the maximum penalty allowable under the Act in a complaint filed in U.S. District Court. After a case has been referred to the Department of Justice, use of this policy is limited to pre-trial settlement.

The procedures set out in this document are intended solely for the guidance of government personnel. They are not intended and cannot be relied upon to create rights, substantive or procedural, enforceable by any party in litigation with the United States. The Agency reserves the right to act at variance with this policy and to change it at any time without public notice.

II. APPLICATION OF SANCTIONS

Section 40 CFR 85.1513(e) provides that: (a) current ICI certificates of conformity may be suspended or revoked; (b) new certificates may be denied for up to three years; and (c) an ICI may be ineligible to import mod/test vehicles. Grounds for the above sanctions include: (a) actions or inaction by an ICI or lab used by the ICI which result in fraudulent, deceitful or grossly inaccurate representation of any fact or condition which affects a vehicle's eligibility for admission, (b) failure of a significant number of vehicles to comply with Federal emission requirements upon inspection or retest, or (c) failure to comply with the imports regulations.

The Manufacturers Programs Branch ("MPB") may seek sanctions for the following violations of the imports regulations:

A. Suspension of certificate(s) for a period of less than the remainder of the ICI's model year -- may be imposed for failure to correct vehicle noncompliances in a timely manner after notification or failure of relatively small number of vehicles imported by the ICI to comply with requirements of 40 CFR Part 85, Subpart P;

B. Revocation of certificate(s) plus denial of certificates for up to one year -- may be imposed for failure of a significant number of vehicles imported by the ICI to comply with the requirements of 40 CFR Part 85, Subpart P or action or inaction by the ICI, the laboratory employed by the ICI or any agent of the ICI that results in fraudulent, deceitful or grossly inaccurate representation which affects the eligibility of any vehicle for importation under 40 CFR Part 85, Subpart P;

C. Revocation of certificate(s) plus denial of certificates for up to two years -- may be imposed for action or inaction by the ICI, the laboratory employed by the ICI or any agent of the ICI that results in fraudulent, deceitful or grossly inaccurate representations which affects the eligibility for importation under 40 CFR Part 85, Subpart P, of a significant number of vehicles; and

D. Revocation of certificate(s) plus denial of certificates for up to three years -- may be imposed for action or inaction by the ICI, the laboratory employed by the ICI or any agent of the ICI which results in fraudulent, deceitful, or grossly inaccurate representations which affects vehicle eligibility for importation under 40 CFR Part 85, Subpart P, for a significant number of vehicles for a substantial amount of time.

III. APPLICATION OF CIVIL PENALTIES

Penalties for violations of the MPB Imports Program regulations should be calculated in accordance with the following specific guidelines in conjunction with MPB's General Penalty Policy. It is important to note that there is no multiple vehicle violation value in the Imports Penalty Policy assessment.

A. TH BENEFIT COMPONENT

The "economic benefit component" should be calculated and added to the gravity-based penalty component when a violation results in "significant" economic benefit to the violator. The economic benefit will include the benefit of delayed costs, avoided costs, and competitive advantage.

1. Delayed Costs

Delayed costs are expenditures which have been deferred by the violator's failure to comply with the requirements. By deferring these one-time nonrecurring costs until EPA takes enforcement action, the violator has achieved an economic benefit.

For example, an importer delays necessary motor vehicle configuration changes that may affect emission. Several months later, EPA discovers the discrepancy during an EPA audit and the manufacturer subsequently makes the necessary changes. In this situation, the affected motor vehicles were not in compliance with the certificate of conformity application specifications in violation of section 203(a)(1) of the Act. Moreover, the manufacturer may have experienced an economic benefit by delaying compliance. Generally, the manufacturer delayed the expenditure of resources necessary to perform the required engineering evaluation or motor vehicle testing to determine that the production change did not affect the motor vehicle's ability to meet the applicable emission standards.

A detailed economic analysis may be computed using the Guidance for Calculating the Economic Benefit of Noncompliance for a Civil Penalty Assessment, November 5, 1984.

2. Avoided costs

Avoided costs are expenditures completely averted by the violators failure to comply. Several examples of avoided costs are discussed below.

For example, costs may be avoided if the importer fails to modify the vehicle in compliance with Federal emission standards. An importers savings may be estimated by assessing the cost savings realized from not performing the necessary modifications. The assessment may also include any net profits, or benefits the importer gained. The profit figure should be adjusted to reflect the present value of net profits derived in the past.

A violation of section 208 of the Act may also result in costs savings to the manufacturer. Section 208 of the Act requires every manufacturer and other regulated persons to establish and maintain records, perform tests, make reports, and provide information to the EPA to determine compliance with Title II of the Act. Specifically, a violator of this section realizes costs savings from avoiding the expenditure of resources necessary to compile the information requested or to maintain the required records. The costs include the labor necessary to retrieve and compile the information.

Any indirect benefits from a section 208 reporting violation should also be recovered. For example, a violator submits an application for a certificate of conformity which includes false or misleading information. Subsequently, the Administrator issues a certificate of conformity for a nonconforming engine family based on that false or misleading information. Although the manufacturer may not realize any significant savings in clerical costs from false reporting, the manufacturer may realize a substantial benefit from avoiding compliance with the emissions requirements. The cost of avoiding compliance should therefore be recovered.

A detailed economic analysis may be computed using the Guidance for Calculating the Economic Benefit of Noncompliance for a Civil Penalty Assessment, November 5, 1984. The EPA BEN computer model may be used to calculate the economic benefit of noncompliance.

3. Competitive Advantage

Removing the savings which accrue from noncompliance will usually be sufficient to remove the competitive advantage the violator has gained. However, in some cases, the noncompliance allows the violator to provide goods or services which are not available elsewhere or are more attractive to the consumer.

For example, an importer may experience a competitive advantage by improperly importing a motor vehicle not normally available in the United States market because it is technologically infeasible to bring the vehicle into conformity with Federal emission standards. The competitive advantage may include any profit the importer gained before the violation was discovered. The value of any competitive advantage the violator gained from noncompliance should be recouped in the economic benefit component.

4. Settling For Less Than The Economic Benefit

To avoid encouraging industry to avoid or delay compliance, the Agency will almost always seek to recover an amount equal to or more than the economic benefit component. Accordingly, any action to settle a case for less than the economic benefit should be infrequent. Further, such settlements should include a detailed justification in the case file. Three instances that may warrant settling a case for less than the economic benefit are discussed below.

It is clear that assessing the benefit component and negotiating over it will often represent a substantial commitment of resources. Such a commitment of resources may not be warranted in cases where the magnitude of the benefit component is likely to be insignificant or de minimus, (e.g. not likely to have a substantial impact on the violator's competitive positions). For this reason, MPB will use its discretion not to seek the benefit component where it appears that the amount of the component is less than \$10,000. When making the determination, MPB should consider the impact on the violator, the size of the gravity component, and the certainty of the magnitude of the benefit component.

In other instances there may be compelling public concerns that would be penalized if a defendant has this penalty component assessed against it. Relevant public concerns may include adverse precedent or extreme financial burden to the defendant resulting in bankruptcy or plant closings. As such it may become necessary to consider settling a case for less than the economic benefit component.

Finally, there may be certain cases in which it is highly unlikely that MPB will be able to recover the economic benefit in litigation. This may be due to applicable precedent, competing public interest considerations, or the specific facts, equities, or evidentiary issues pertaining to a particular case. In such a situation it is unrealistic to expect MPB to obtain a penalty in litigation which would remove the economic benefit. Accordingly, MPB should pursue a lower penalty amount.

B. THE GRAVITY COMPONENT

1. Identifying the Potential for Harm

The Federal emission standards and regulatory requirements were promulgated to prevent harm to human health and the environment. Certain regulatory requirement violations may create a risk of harm by jeopardizing the integrity of the Federal emission program. Thus, noncompliance with any Clean Air Act emission standard or regulatory requirement can result in a situation where there is potential for harm to human health or the environment.

Accordingly, the assessment of the potential for harm resulting from a violation should be based on: 1) the risk of human or environmental exposure to exhaust emissions and/or constituents posed by noncompliance; and 2) the risk of adverse effect on statutory or regulatory purposes or procedures implementing the emissions program posed by noncompliance.

2. Ranking the Potential Harm

Enforcement personnel should evaluate whether the potential harm is major, moderate, or minor for each violation. Each category is defined below.

Major - The violations pose or may pose a substantial risk of exposure of humans or the environment to harmful exhaust emissions or constituents; and/or the violations have or may have a substantial adverse effect on the regulatory purposes or procedures implementing the emissions program.

An example of a violation in this category is an instance where an entity imports a nonconforming motor vehicle into the United States without obtaining a certificate of conformity or without complying with the certificate of conformity application specifications.

Moderate - The violations pose or may pose a significant risk of exposure of humans or the environment to harmful exhaust emissions or

constituents; and/or the violations have or may have a significant adverse effect on statutory or regulatory purposes or procedures implementing the emissions program.

An example of a violation in this category is an instance where an entity releases an imported nonconforming motor vehicle during the conditional admission period or the 15-day hold period. Another example of a violation in this category is an instance where an entity fails to respond to an EPA inquiry under Section 208 of the Act.

Minor - The violations pose or may pose a relatively low risk of exposure of humans or the environment to harmful exhaust emissions or constituents; and/or the violations have or may have an adverse effect on the statutory or regulatory purposes or procedures implementing the emissions program.

An example of a violation in this category is an instance where an entity fails to comply with recordkeeping requirements under 40 CFR Part 85, Subpart P.

3. Ranking the Extent of Deviation .

The extent of deviation from a statutory or regulatory requirement relates to the degree of noncompliance with that requirement. Enforcement personnel should evaluate whether the extent of deviation is major, moderate, or minor for each violation. Each category is defined below.

Major - The violator deviates from the requirements of the regulation or statute to such an extent that most (or important aspects) of the requirements are not met resulting in substantial noncompliance.

Examples of a violation in this category include: 1) importing a nonconforming motor vehicle into the United States without obtaining a certificate of conformity; 2) releasing an imported nonconforming motor vehicle during the conditional admission period, but prior to the 15-day hold period; and 3) failing to maintain many records required under 40 CFR Part 85, Subpart P. Another example of a violation in this category is an instance where an entity fails to respond to an EPA inquiry under Section 208 of the Act.

Moderate - The violator significantly deviates from the requirements of the regulation or statute, but some of the requirements are implemented as intended.

Examples of violations in this category include: 1) importing a nonconforming motor vehicle into the United States under a certificate of conformity, but failing to comply with many certificate of conformity application specifications; 2) releasing an imported nonconforming motor vehicle during the 15 day hold period; and failing to maintain several records required under 40 CFR Part 85, Subpart P. Another example of a violation in this category is an instance where an entity response to an EPA inquiry under Section 208 of the Act is

significantly late.

Minor - The violator deviates somewhat from the regulatory or statutory requirements but most (or all important aspects) of the requirements are met.

Examples of violations in this category include: 1) importing a nonconforming motor vehicle into the United States under a certificate of conformity, but failing to comply with one or several certificate of conformity application specifications; 2) releasing a nonconforming motor vehicle during the conditional admission period or the 15-day hold period, but maintaining control over the vehicle. Another example of a violation in this category is an instance where an entity response to an EPA inquiry under Section 208 of the Act is minimally late.

4. Dollar amount Matrix Assessment

The potential for harm and extent of deviation form the axes of the penalty assessment matrix. The matrix has nine cells, each containing a penalty range. The specific cell is chosen after determining which category is appropriate for the potential for harm factor, and which category is appropriate for the extent of deviation factor. The lowest cell contains a penalty range from \$100 to \$499. The highest cell is limited by the maximum statutory penalty allowance of \$25,000.

Enforcement personnel must select the penalty amount within each cell in each case. The dollar amount range within each cell allows enforcement personnel to assess an initial gravity component figure that adapts the general gravity of the violation to case specific facts. This matrix is illustrated below.

Table 1: EXTENT OF DEVIATION VALUE
(See original for this table)

A matrix containing case specific examples is attached (Attachment 2).

a. Vehicle violation categories

For purposes of this policy, imports program violations should be grouped into two categories: vehicle compliance violations and recordkeeping violations. Vehicle compliance problems include requirements concerning vehicle modifications to meet certification specifications, vehicle testing, vehicle labeling, the 15-day hold period, and warranty coverage. All compliance problems associated with one vehicle should be considered one violation. Recordkeeping violations include requirements concerning records that the ICI is required to retain for EPA inspection. All recordkeeping violations related to one vehicle should be treated as one violation.

b. Penalties for Multi-Day Violations

The Act provides EPA with the authority to seek civil penalties in court or an administrative hearing not more than \$25,000 per day of non-compliance for each violation of a requirement under 203(a)(2) of the Act. This language explicitly authorizes the Agency to consider the duration of each violation as a factor in determining an appropriate total penalty amount. MPB's General Penalty Policy provides guidance for calculating this component.

IV. ADJUSTMENTS, MITIGATION, AND DOCUMENTATION GUIDANCE

Finally, MPB's General Penalty Policy provides guidance for adjusting the gravity component, determining the size of violator value, assessing any litigation risks, calculating the defendant's ability to pay, the use of supplemental environmental projects, and case documentation. An Imports Program Penalty Worksheet is attached. (Attachment 3)